No. 15,779

IN THE

United States Court of Appeals

For the Ninth Circuit

ABRAHAM CHALUPOWITZ,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Statutes

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JURISDICTION.

Jurisdiction is invoked under Section 2255 of Title 28 United States Code.

STATEMENT OF CASE.

Appellant was indicted May 2, 1951. The indictment in four counts, alleged violation of the narcotic laws of the United States. The first count charged that appellant, on December 8, 1950, sold, dispensed and distributed 211 grains of heroin not in or from the original stamped package in violation of the Harrison Narcotic Act. The second count charged that

appellant, at the time and place mentioned in the first count, concealed and facilitated the concealment of 211 grains of heroin in violation of the Jones Miller Act. The third count charged that appellant, on the 14th day of December, 1950, sold, dispensed and distributed 5 ounces 14 grains of heroin not in or from the original stamped package, in violation of the Harrison Narcotic Act. The fourth count charged that appellant concealed and facilitated the concealment of 5 ounces and 14 grains of heroin at the time and place mentioned in the third count of the indictment, in violation of the Jones Miller Act.

On May 3, 1951 appellant, represented by Kenneth Zwerin, a member of the bar of United States District Court for the Northern District of California, was arraigned.

On May 10, 1951 appellant, represented by counsel, plead not guilty.

On June 15, 1951 George T. Davis, a member of the bar of the United States District Court for the Northern District of California, was substituted for Kenneth Zwerin as appellant's counsel of record. The substitution took place in open Court and in appellant's presence, without his objection, before Judge Edward P. Murphy of the United States District Court for the Northern District of California.

On August 17, 1951 appellant withdrew his plea of not guilty to counts 1 and 2 of the indictment, and moved to dismiss counts 3 and 4.

Counsel for the government immediately thereafter stated:

> "Mr. Karesh. May I say this, Your Honor, I informed counsel while we would have no objection to Counts 3 and 4 being dismissed, it was primarily the concern of this Court. I informed counsel that if Counts 3 and 4 were dismissed and a plea was permitted to the first and second counts, after conference with the Bureau of Narcotics, that we would ask the court, on behalf of the United States Attorney's office and the Bureau of Narcotics to impose the maximum sentence on both counts and the maximum fines."

Counsel for the government then asked counsel for appellant whether or not the statement was correct.

Counsel for appellant, in presence of appellant, stated: "Yes, substantially." Thereafter counsel for appellant stated that Mr. Karesh had told him that he was going to ask for the maximum fine and the maximum penalty.

The Court then granted permission to plead to the first and second counts.

The Clerk then asked appellant whether it was his wish to withdraw his previous plea to the indictment, and appellant answered, "Yes."

Appellant was then asked what his plea to counts 1 and 2 of the indictment was, and he stated guilty.

The Court then imposed a sentence of 5 years and a fine of $2,000 on the first count of the indictment, and a sentence of 10 years and a $5,000 fine on the second count of the indictment. The term of imprisonment on the second count of the indictment was to commence and run from and after the expiration of

the term of imprisonment imposed on the first count of the indictment, which was the maximum sentence imposed by law.

On January 3, 1955 Judge Murphy denied a motion on the part of petitioner to modify sentence. The motion for modification did not allege any of the grounds urged here. Judge Murphy indicated that he had reviewed the entire file and proceedings and could see no reason for a modification of appellant's sentence. This motion for modification was made at the expiration of appellant's term of imprisonment on the first count of the indictment.

It appears from the affidavit of John H. Riordan, Jr., Assistant United States Attorney, which was filed in conjunction with appellee's motion to dismiss and for summary judgment that appellant appeared as a witness for the defense in the case of *United States v. Mario Balestreri,* C.R. No. 33192, in the United States District Court for the Northern District of California on August 20, 1953. At that time appellant was asked by counsel for the government whether he was convicted in San Francisco for violation of the narcotic laws. Appellant answered:

"A. That is right.

Q. And you are serving a fifteen year sentence?

A. That is right.

Q. At the time you were convicted in 1951 for violation of the Narcotic Laws here in San Francisco you were a parolee, is that correct?

A. Not a—on probation.

Q. You were on probation?

A. I was on conditional release.

Q. That was a conditional release from Fort Worth, Texas?

A. That is probation. And I plead guilty in the Court. I [109] wasn't tried. I was guilty and I plead guilty.

Q. That was here you plead guilty?

A. Yes.

Q. In San Francisco, before Judge Goodman?

A. No, sir.

Q. Judge Murphy?

A. Judge Murphy.

Q. In the United States District Court for this district?

A. That is right.

Q. By the way, you were represented by an attorney, though, at that time? At the time you plead guilty here in San Francisco in 1951 for conspiring to violate the Narcotic Laws you had an attorney?

A. Yes, sir.

Q. You weren't tried? You pleaded guilty to the conspiracy charge, is that correct?

A. I pleaded guilty. I was guilty and I pleaded guilty.

Q. You were guilty and you pleaded guilty?

A. Pleaded guilty."

On June 18, 1957 appellant filed a motion to vacate his sentence pursuant to Section 2255 of Title 28 United States Code. On August 22, 1957 the United States moved to dismiss and for summary judgment. On September 9, 1957 the Court denied appellant's motion to vacate sentence. Appeal was then made to this Court.

OPINION OF THE COURT BELOW.

On August 17, 1951, Abraham Chalupowitz pleaded guilty to counts one and two of a four-count indictment charging him with violations of the Federal narcotics statutes. Counts three and four were dismissed. He was sentenced to serve a term of five years imprisonment and pay a $2,000.00 fine on count one and to serve a term of ten years imprisonment and pay a $5,000.00 fine on count two, the terms of imprisonment to run consecutively.

He has served the five-year term of imprisonment imposed on count one and now moves the Court, six years after imposition of sentence, pursuant to 28 U.S.C. 2255, to vacate the sentence imposed on count two. The ground of his motion is that at the time he entered his plea of guilty he did not have the effective assistance of counsel because his attorney had falsely represented to him that the prosecuting attorney and the trial judge had agreed that if he pleaded guilty to counts one and two he would receive a sentence of one-year on count one, no sentence on count two, and would be deported after serving one-third of the sentence on count one.

The United States has moved for denial of the motion to vacate sentence on the ground that the files and records of the case conclusively show that Chalupowitz is entitled to no relief.

The reporter's transcript of the proceedings upon the entry of Chalupowitz's plea of guilty on August 17, 1951 reveals the following pertinent statements:

"Mr. Davis (Defendant's Attorney). At this time, as I understand it, there will be a plea. We will ask the Court for permission to withdraw the plea of not guilty to Counts 1 and 2 of the indictment numbered 329—whatever it is—32937—that is Counts 1 and 2. That is the one count under the Jones Act, as I understand it, and one count under the Harrison Act. I would like to make a motion at this time, Your Honor, that Counts 3 and 4 be dismissed.

Mr. Karesh (The United States Attorney). May I say this, Your Honor, I informed counsel while we would have no objection to Counts 3 and 4 being dismissed, it was primarily the concern of this Court. I informed counsel that if Counts 3 and 4 were dismissed and a plea was permitted to the first and second counts, after conference with the Bureau of Narcotics, that we would ask the Court, on behalf of the United States Attorney's Office and the Bureau of Narcotics, to impose the maximum sentence on both counts and the maximum fines. I think Mr. Davis will bear me out that the Court could not be bound; we are not attempting to bind the Court by this. We would have no objection and the Bureau of Narcotics would have no objection. The ultimate decision is, of course, for the Court. Is that correct Mr. Davis?

Mr. Davis. Yes, substantially. But I would like to just clarify one thought or two. My understanding was, of course, that no one was to be bound; that is, certainly the Court will not be bound in any way by any discussions of ours. Mr. Karesh told me that he was going to ask for a maximum fine and maximum penalty, but, of course, it was also understood that I would have

something to say to the Court, also, and I think we are of the opinion that the Court will decide this matter on its merits and not on the basis of what the Narcotics Bureau wants. Now, also part of our understanding, that as to that second indictment, this 33000, that Mr. Karesh would take it up with the Department and would request that it be dismissed, on the theory that whatever action is taken in connection with this case will cover the situation.

Mr. Karesh. I may say, Your Honor, I told that to Mr. Davis, after conference with the Bureau of Narcotics, if the plea was entered in this case that we would recommend to the Department the dismissal of the second indictment. I, of course, said that the Department would not necessarily go along with my recommendation, but I did it after conference with the Bureau of Narcotics and after conference with members of our office.

The Court. All right. Permission is granted to plead to the first and second counts, and I will rule on the matter of dismissing the others after hearing from the Agent.

The Clerk. Abraham Chalupowitz, is it your wish to withdraw your previous plea to this indictment as this time?

The Defendant. Yes.

The Clerk. What is your plea to counts 1 and 2 of the indictment, guilty or not guilty?

The Defendant. Guilty."

Chalupowitz freely entered his plea of guilty in the face of the definite and unequivocal statement in open Court by his attorney that it was understood that the

government would ask for the maximum sentence on counts one and two, and that the Court would not be bound in any way by any discussion between counsel. Chalupowitz does not claim that there was in fact an arrangement between his attorney and the United States Attorney and the trial judge for him to receive a lesser sentence. He alleges only that his attorney falsely informed him that such an arrangement had been made. Assuming the truth of this allegation, he could not reasonably have relied on such representation by his attorney, after hearing the statement of the United States Attorney made in open Court and his own attorney's acquiescence therein prior to his guilty plea.

The record in this case clearly shows that Chalupowitz is not entitled to any relief. His motion to vacate the sentence on count two of the indictment is denied.

"Dated: September 9, 1957."

ARGUMENT.

Appellant makes various claims concerning his plea of guilty to two counts of violation of the narcotic laws of the United States. In substance, he asserts that the attorney representing him at the time of his plea of guilty represented to him that he would receive less than the sentence which he received. His expectation in that respect, according to his affidavit, was that he would receive one year on count one, but

that there would be no sentence on count two of the indictment. (Page 5, appellant's affidavit.) Apparently, appellant does not contend that he was not guilty of count one of the indictment.

I. APPELLANT MAY NOT CLAIM HIS SENTENCE WAS ILLEGAL BECAUSE HE RECEIVED MORE OF A SENTENCE THAN HE EXPECTED.

The Court of Appeals for the Eighth Circuit in *Sweeden v. United States* (8th Cir.), 209 F.2d 524, stated:

> "That the sentences were more severe than he anticipated is of no consequence as far as their legality is concerned."

Appellant's contentions amount to no more than that he expected one year and received fifteen. The cases uniformly have held that more than this is required to invalidate a judgment.

Appellant inferentially admits his guilt as to the first count of the indictment, which charged a sale of heroin. The second count of the indictment charged the concealment of the same heroin referred to in the first count of the indictment. The charges are so connected it seems difficult to believe appellant's protestations of innocence as to the second count of the indictment.

However, appellant does not allege that he did not understand the nature of the plea of guilty. He merely claims that he expected leniency to be shown to him by the Court. Appellant has vast experience

in the consequences involved in entering a plea to a criminal charge. The records of his case reflect that on three prior occasions he was convicted of narcotic charges in the United States Courts.

Since appellant was experienced in the process of criminal law, and since he does not claim in his affidavit that he did not understand the nature of the plea of guilty his contentions deal only with the length of his sentence. Appellant has admitted all of the essential elements of his offense by his plea of guilty. Section 2255 of Title 28 United States Code does not authorize a motion to vacate a judgment on the grounds that the sentence is too long, unless that sentence is in excess of the maximum authorized by law. Appellant's admission of his guilt of the offense, together with his presumed understanding of the nature of the plea, authorized the Court to impose any sentence authorized by law. Judge Murphy imposed such a sentence. Appellant's allegations, therefore, even if they be true, would not authorize his release.

II. APPELLANT DOES NOT ALLEGE MISCONDUCT ON THE PART OF THE UNITED STATES ATTORNEY OR THE COURT.

Appellant in no place alleges that his entry of the plea was induced by any representations made by the Court or the government. His only claim is that he was *told* by his counsel that such representations had been made. The statements made by Mr. Davis, if indeed he made any such statements, concerning what

was told to him by the Court and government counsel, as alleged in appellant's affidavit, are the merest hearsay. Appellant could not testify as to such statements at any hearing which might be held. The contentions he makes cannot amount to a showing of any fraud on the part of the Court or the government.

When the infirmity in a habeas corpus claim or 2255 proceeding goes to the entry of a plea of guilty, the promises must be alleged to be made by the United States Attorney or the District Judge.

Meredith v. U.S. (4th Cir.), 208 F.2d 680;
Tabor v. U.S. (4th Cir.), 203 F.2d 948.

It is necessary to show some misconduct on their part before the contention will be considered.

U.S. v. Tacoma (2d Cir.), 176 F.2d 242.

In the *Meredith* case, supra, the Court held, despite the claim of a promise on the part of the defense attorney, that no hearing was necessary because the allegations of the petition were insufficient. In the *Tacoma* case supra the claim on the part of the petitioner there was that counsel had informed him that the United States Attorney would dismiss a pending indictment in return for a plea of guilty to the charge. These cases in no essential particular differ from the one here.

Furthermore, appellant must allege in a proceeding such as this that he is not guilty of the charge since there is no need for setting aside a plea, the truth of which is not contested. Appellant makes no allegations with respect to the facts surrounding his

case. He inferentially admits his guilt to the first count of the indictment, and only makes a bald claim of innocence, without further comment, with respect to the second count of the indictment. However, as appears from our affidavit, when appellant testified in a related case on August 20, 1953 he stated in response to questions about the instant conviction, "I pleaded guilty. I was guilty, and I pleaded guilty." As has been mentioned above, the second count of the indictment concerns the concealment of the very narcotics which appellant inferentially admits he sold. No Court could be satisfied from the record made here that there is a fair chance that appellant is not guilty of the offense to which he had pleaded. There must be something in the record or in the allegations which indicate innocence before a Court will set aside a formal judgment of conviction on collateral attack.

Appellant has not met the conditions precedent to setting aside his plea of guilty. He has directly alleged neither prejudicial misconduct on the part of the Court, nor on the part of the government. Furthermore, since his claim goes only to the length of his sentence, rather than the understanding of the nature of his plea, he does not, as has been stated previously, even have a claim which, if true, would justify setting aside his conviction.

III. APPELLANT'S APPLICATION IS NOT TIMELY.

Appellant was convicted in August of 1951, six years ago. He now for the first time claims he was defrauded. Immediately prior to his plea and sentence government's counsel, in his presence, asked for the maximum sentence which could be imposed by law, and stated that he had informed counsel for the defense that such a recommendation was to be made. Appellant's counsel, in his presence, admitted that he had been informed by the government that they would recommend the maximum penalty. Appellant made no objection, and expressed no surprise at these statements on the part of his counsel, and the Assistant United States Attorney. His only action was to plead guilty to the charges. He made no objection to the sentence at the time it was imposed, and he made no motion to modify sentence within the 60 days allowed by the rules. In fact, when a motion for modification was made at the expiration of his first sentence the claim made here was not urged.

In *Young v. U.S.* (8th Cir.), 228 F.2d 693, the petitioner asserted that he had been fraudulently "induced by government counsel to enter a plea." The Court there held that since he did not claim any breach of an agreement at the time, although the United States Attorney had asked for the maximum sentence, no hearing on his contentions pursuant to Section 2255 could be given.

In *Crowe v. U.S.* (4th Cir.), 175 F.2d 799, it was alleged that the defendant had been tricked by the Federal Bureau of Investigation, the United States

Attorney, and defense counsel into a plea of guilty. The Court there held that since the contentions could have been raised at the time of sentence no hearing need be given under Section 2255. *United States v. Lowe* (2d Cir.), 173 F.2d 346 hold to the same effect. It was alleged there that a bargain had been made to induce a plea of guilty. The remark made by the Court in *Bloombaum v. U.S.* (4th Cir.), 211 F.2d 944 is apropos here, "If he had any defense to the charge he should have presented it at the time."

IV. APPELLANT'S CLAIM IS WITHOUT MERIT.

The circumstances surrounding appellant's allegations give a strong indication of perjury. Appellant made no claim at the time of sentence, at the time of motion for modification, or indeed at any time until now, some six years after the event. At the time of plea and sentence both his own counsel and government's counsel stated in open Court that the government intended to recommend the maximum sentence. The Assistant United States Attorney handling the case actually asked for the maximum sentence. Appellant, although present and presumably articulate, made absolutely no protestations. Although he makes some suggestion of his innocence now, nevertheless at the time he was a witness in another case he cheerfully admitted his guilt to the charge. The allegations themselves, with their suggestion of strange exotic countries, and three months sentences for a thrice

convicted dope peddler, are so improbable as to approach the fantastic.

We strongly urge to the Court that Section 2255 of Title 28 United States Code was not enacted as a ticket for transportation out of prison for prisoners with groundless and possibly perjurous claims. As was stated in *Carvell v. U.S.* (4th Cir.), 173 F.2d 348, it would destroy prison discipline to put the election of travel in the hands of prisoners serving a sentence.

CONCLUSION.

The motion, files and records in this case conclusively showed that appellant was entitled to no relief. Judge Goodman properly denied the petition. The judgment below should be affirmed.

Dated, San Francisco, California,
February 6, 1958.

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Attorneys for Appellee.